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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1329

THE STATE OF OHIO,

Petitioner,

v.

DANIE LEE TETER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Ohio, prays that a Writ of Certiorari issue to review the final order of the Ohio Ninth District Court of Appeals, issued on May 2, 1977, wherein the Court reversed the convictions of Respondent, Danie Lee Teter. The Supreme Court of Ohio, on November 25, 1977, overruled Petitioner's motion for leave to appeal.

OPINION OF THE COURTS BELOW

TRIAL COURT: No written opinion was rendered. A copy of the judgment entry is annexed to this Petition as Appendix A.

COURT OF APPEALS: A copy of the unreported opinion of the Ohio Ninth District Court of Appeals, is annexed to this Petition as Appendix B.

OHIO SUPREME COURT: A copy of the order dismissing Petitioner's motion for leave to appeal is annexed to this Petition as Appendix C.

JURISDICTION

First, the Ohio Ninth District Court of Appeals improperly found a denial of Respondent's Sixth Amendment right of cross-examination and confrontation concerning the testimony of Mrs. Ray Clark.

Second, the statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court below is 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORIAL PROVISIONS INVOLVED

Constitution of the United States
Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Code
Section 28 U.S.C. 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3)By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTION PRESENTED

Does the introduction of hearsay testimony by the prosecution which does not fit within the parameters of any of the common law exceptions to the hearsay rule necessarily deny a defendant's Sixth Amendment right to cross-examination and confrontation?

STATEMENT OF THE CASE

The Summit County Grand Jury, during the January term of 1976, indicted Donald E. Webb, Jr., Terry E. Achberger, Wilford W. Hyde, Jr., Marion Franklin Sperrow, Jr., and Danie Lee Teter for the offenses of Aggravated Murder with three Specifications and Aggravated Robbery. These indictments were the result of the homicide of Akron Police Officer Gary Yost. Both the Respondent and Achberger were arraigned on May 11, 1976, at which time each entered a plea of Not Guilty to every offense charged. The trial court revoked Teter's and Achberger's bonds and remanded them to the Summit County Jail.

On May 21, 1976, the trial court heard testimony and oral arguments on the Respondent's and Achberger's Motions to Dismiss the indictments. The basis of the motions was the presence of a Sheriff's Department detective in the Grand Jury room during the taking of testimony. The detective in question was operating a recording device at the request of the prosecution, and it was the Petitioner's position that Ohio Criminal Rule 6(D) permitted his presence. The Respondent and Achberger

maintained that the rule was never intended to permit a police officer to be present as a recording device operator and that no prejudice need be shown for the indictments to be dismissed. Alternatively, the Respondent and Achberger argued that prejudice could be shown by virtue of the fact that some witnesses may have been intimidated by the presence of a police officer during the taking of testimony. The trial court dismissed the indictments after finding that Criminal Rule 6(D) and Sections 2939.11 and 2939.08 Ohio Revised Code did not permit the presence in the Grand Jury room of this officer.

On June 1, 1976, the Respondent and Achberger were arraigned on the reindictments and each entered a plea of Not Guilty. Further, co-defendants Hyde and Sperrow were present, with counsel, at this time for a hearing on the Petitioner's Motion for Joinder. After hearing oral arguments from counsel for all parties, the trial court took the matter under advisement.

The Petitioner, on June 4, 1976, modified its Motion for Joinder to exclude defendant Hyde due to a potential Bruton problem. The trial court ordered that the Respondent, Achberger, and Sperrow be tried together with the trial of Hyde to go forward first.

On June 9, 1976, the trial court overruled the Respondent's motions for a special venire and an individual voir dire. Further, the trial court overruled the Respondent's request to be present at the in camera hearing to be held concerning the certification by the Petitioner of the names of certain witnesses. On June 10, 1976, the trial court held an in camera hearing concerning the certification of the names of three prosecution witnesses, to-wit: Michael Burns, Leonard Evans, and William Moore.

The Petitioner, on June 28, 1976, requested the trial court to enter a nolle prosequi with regard to the case against defendant Sperrow. The request was based on the status of the evidence against Sperrow at that time. Defendant Sperrow entered an objection to a dismissal without prejudice. The trial court denied the request for a nolle prosequi, but did order that Sperrow be tried separately. The Respondent and Achberger were then tried to a jury and convicted of Aggravated Murder with two Specifications and Aggravated Robbery.

On September 28, 1976, the trial court held a hearing, including the taking of testimony from two witnesses, on the Respondent's motion for a new trial. The following day, Achberger presented his witnesses and oral argument on his motion for a new trial. The trial court, in a Finding and Journal Entry dated October 4, 1976, overruled both motions. Mitigation hearings were held and the trial court found mitigating circumstances concerning both the Respondent and Achberger. Thereafter, the Respondent and Achberger were sentenced to life imprisonment for Aggravated Murder and seven to twenty-five years for Aggravated Robbery.

Marion Franklin Sperrow, Jr. and Wilford W. Hyde, Jr. were tried and acquitted on all counts. Donald E. Webb pled guilty to Murder and Aggravated Robbery and was sentenced to fifteen years to life and seven to twenty-five years.

The Ohio Ninth District Court of Appeals reversed the Respondent's convictions on May 2, 1977. The Supreme Court of Ohio overruled the Petitioner's Motion for Leave to Appeal this case on November 25, 1977.

STATEMENT OF FACTS

Christine Yost, widow of Officer Gary Yost, testified that on August 22, 1975, at approximately 11:45 P.M., her husband left home and proceeded directly to Shipper Dispatch Inc. (hereinafter referred to as Shippers), which is located at 999 Swartz Road, Akron, Ohio. Officer Yost was employed part-time as a security guard by Shippers. On the evening in question, Mrs. Yost testified that her husband was wearing a blue jacket and dark slacks, both of which were in good repair, and that he did not have an bruises on his face or hands. Further, Mrs. Yost testified that her husband took his service revolver, flashlight, and lunch in a paper bag with him to work. Mrs. Yost testified that her husband drove a '72 red Ambassador automobile and that he was right-handed. Finally, Mrs. Yost testified that shortly after 7:00 A.M., on August 23, 1975, she proceeded to Shippers in order to locate her husband who had not returned home at his usual time. Mrs. Yost saw his automobile in the parking lot but was unable to find Officer Yost. One of the other employees assisted Mrs. Yost in her search. Mrs. Yost testified that she eventually called the Summit County Sheriff's Department and waited for their arrival (Transcript, Volume III, Pages 38-47).

Orrin Cameron James, an assistant manager and rate clerk at Shippers, testified that his duties involved night supervision and operation of the terminal. James testified that he was finishing his shift when Officer Yost arrived between 11:30 P.M. and 12:00 A.M., on August 22, 1975. According to James, Officer Yost appeared to be unbruised and in good spirits and was carrying his flashlight. James testified that it was normal procedure not to lock the trailers

containing tires or other merchandise which were parked in the yard at Shippers. James testified that he left work at approximately 12:55 A.M., but returned at 8:00 A.M., on August 23, 1975, after he was called by the dispatcher. He then proceeded to the northern end of the yard where he observed the body of Officer Yost. James testified that he saw a police officer pick up a gun that was located near the body and place it in a plastic bag. Further, James testified that a driver had taken a trailer from Shippers on August 23, 1975, at 5:30 A.M. (Transcript, Volume IV, Pages 370-380).

Dale Charles Richards, a local driver for Shippers, testified that he arrived at the terminal on August 23, 1975, at 7:35 A.M. Shortly after his arrival, Richards testified that Mrs. Yost approached him and asked for his help in locating her husband. Richards then testified that he finally found the body lying on the ground at the northern end of the yard. He also observed a gun and a flashlight nearby. Richards testified that State's Exhibit No. 6 accurately portrayed the location of several tires, one on the other side of the fence, in relation to the body (Transcript, Volume IV, Pages 381-386).

Douglas A. Jenney, a Coroner's investigator, testified that on August 23, 1975, at approximately 8:15 A.M., he observed the body of Officer Yost lying on the ground at Shippers near the edge of the property line. Jenney testified that he saw a gun, flashlight, and a knife laying in the area immediately surrounding the body. There was a partially opened trailer containing tires nearby and several tires on the other side of the fence from where the body was lying. Jenney testified that the entire area was photographed before the body and the physical evidence were disturbed.

Finally, Jenney testified that he removed the clothing and personal effects from Officer Yost which were subsequently turned over to the Akron Police Department (Transcript, Volume IV, Pages 386-394).

Dr. A. H. Kyriakides, the Summit County Coroner, testified that he performed an autopsy on the body of Officer Yost on August 23, 1975. The external examination revealed that there was an abrasion on the top of the right hand overlying the first and second knuckles, three distinct scratch marks on the left chest and upper abdomen, and a bruise on the right cheek. Dr. Kyriakides testified that the entrance wound was found in the back, 53 inches from the right heel and 2.6 centimeters to the right of the midline of the body. It was irregular and there was fouling and stippling present. The exit wound was located two inches below the right nipple and toward the middle of the body. The path of the bullet was from left to right, below upward, and from back to front. Dr. Kyriakides testified that the cause of death was cardio-circulatory collapse due to internal hemorrhaging which was the result of a gunshot wound. Further, Dr. Kyriakides testified that the distance between the muzzle and the body was within three feet, and that no missile was found in the body. Finally, Dr. Kyriakides testified that death was not instantaneous but rather occurred approximately one-half hour after the shooting, and that the time of death was 2:00 A.M. to 2:30 A.M. (Transcript, Volume IV, Pages 204-221).

Detective Richard C. Schafer, an Akron Police Department officer assigned to the Identification Bureau, testified that on August 23, 1975, he and Detective William Rice took numerous photographs of the crime scene and looked for physical evidence at Shippers. Further, Schafer testified

that photographs were taken of the Empire Corporation which is located directly north of Shippers. These photographs depicted the location of a bullet hole in a window of Empire and the location of the missile inside of the building. Detective Schafer testified that State's Exhibit No. 39, the gun found at the scene, was registered to Officer Yost and that the glass on the flashlight which was recovered had been broken. Finally, Schafer testified that no identifiable fingerprints were found on the gun, knife, flashlight, trailers, or tires recovered from the scene (Transcript, Volume V, Pages 426, 467).

Henry Dombrowski, a criminalist employed at the Ohio Bureau of Identification, testified that State's Exhibit No. 40, the missile recovered from the Empire Corporation, had been fired from State's Exhibit No. 39, Officer Gary Yost's gun. Further, Dombrowski testified that there were two cuts in Officer Yost's jacket that could have been made by a knife and that there were tears in the pants worn by the deceased (Transcript, Volume IV, Pages 395-423).

Donald Webb's testimony began with a lengthy recital of his past criminal and drug related activities. The essence of this testimony was that Webb spent two years in the Boys Industrial School, entered the Army in 1970 and began using speed (amphetamines), and was honorably discharged in 1972. Prior to his incarceration in the Mansfield Reformatory sometime in 1972, Webb met Achberger and supported himself and his drug habit by selling drugs and committing burglaries. While in Mansfield, Webb met Wilford Hyde who subsequently introduced Webb to Marion F. Sperrow, Jr. on August 22, 1975. Webb testified that his relationship with Achberger was one of friendship and business, to-wit: Webb received his speed from

Achberger in exchange for stolen property and stolen drugs. Webb testified that Achberger introduced Webb to Danie Teter on the evening of August 22, 1975.

Donald Webb testified that during the day of August 22, 1975, he contacted Dave Childs in order to set up a drug transaction. Childs advised Webb that he did not want to purchase any drugs but that a friend of his was interested in the deal. Webb testified that he and Childs agreed to meet with the buyer at Virginia Kendall Park later that day. Webb and Childs eventually arrived at the park where they met Wilford Hyde and Frank Sperrow. Webb testified that when he told Hyde and Sperrow that the purchase price was Two Thousand Dollars ($2,000) for a quantity of narcotics, they advised Webb that they would try and have the money later on that same night. Webb and Childs then proceeded to Childs' mobile home at the Ascot Trailer Park to wait for the money.

Shortly after 10:00 P.M., on August 22, 1975, Childs drove Webb to Hyde and Sperrow's house at which time Childs left. Webb testified that Hyde and Sperrow then told him that they could not raise that much cash. Webb advised them that they could still have the drugs if they would help Webb steal some tires. Hyde and Sperrow agreed. Webb testified that he telephoned Achberger shortly thereafter and told him that he had two guys and a truck to help steal tires. Achberger, according to Webb's testimony, had told Webb about the tire deal sometime in March or April of 1975. The three men then left and proceeded to Schiller Street to pick up the drugs. Webb testified that he rode with Sperrow in a green pickup truck and Hyde drove a blue Vega. From Schiller, they went to Achberger's house on Tulip Street at approximately 11:00 P.M. to 12:00 A.M.

Webb left Sperrow and Hyde outside and went into the house to speak with Achberger. Webb testified that he found Achberger in the basement with the Respondent. Achberger gave Webb Two Thousand Two Hundred Dollars ($2,200) and all three men left the house. Webb testified that all five men had gloves and that he, Achberger, and the Respondent had guns. The Respondent and Achberger rode in Achberger's blue Pontiac, Hyde drove his Vega, and Sperrow and Webb rode in the green pickup truck to Shippers at approximately 12:00 A.M. to 1:00 A.M. The vehicles were parked on the outside of the fence and the men proceeded to climb over it. Webb testified that Achberger instructed him to open one trailer while Achberger opened another, and that Hyde, Sperrow, and the Respondent were checking for security guards. Achberger's trailer was empty and he approached Webb's in order to assist him in removing the tires. Webb testified that he threw two or three tires out of the truck, one on the ground and one over the fence. Achberger then instructed Webb to find the other men to help unload the truck. Webb testified that he walked around the other side to watch for guards. Achberger yelled, "run" to Webb at the same time Webb was approached by a man with a flashlight and a gun who told him to freeze. Webb testified that he saw Hyde and the Respondent jump the man from behind and begin to wrestle with him. Webb ran towards the fence and as he was climbing over it, Webb heard a gunshot. Achberger was already on the outside of the fence. Webb testified that he started the green pickup truck while Achberger drove towards him in his own car. Webb then got out of the truck and drove off with Achberger, taking the money and the drugs with him.

Webb testified that he and Achberger went back to Achberger's house where both men injected speed. Approximately one hour later, Webb went to Butch Vance's house and went home at approximately 4:00 A.M. or 5:00 A.M.

Webb was arrested early in 1976 on an armed robbery charge. While in jail, Webb testified that he talked to a man named McAnulty about the Yost homicide. In April of 1976, Webb spoke with two detectives about the case. Webb testified that he gave several statements to the detectives in which he lied, in part, to protect himself and Achberger. Ultimately, Webb implicated his four co-defendants and agreed to testify against him (Transcript, Volume III, Pages 48-128).

Michael Burns testified the Respondent and Achberger knew each other and dealt speed with each other. Further, Burns testified that he worked on Achberger's blue Pontiac in April or May of 1975. Finally, Burns testified that in the latter half of August, 1975, he saw the Respondent at Corkey Bourne's house on Dietz Avenue. At this time, Burns testified that the Respondent told him that he (Respondent) had just gotten back into town and that he and Joyce Yeager had just had a baby two or three days ago. Burns also testified that the Respondent made a telephone call to Joyce who was still out West (Transcript, Volume V, Pages 540-600).

John Marsh testified that sometime in August of 1975, he was in Achberger's basement with Bud Dennison, Gary Shaffer, Michael Apazeller, and Achberger when he overheard Achberger say, "We got to get him. We got to get a pig. We got to get Yost." Marsh testified that although he was not in the same room at time of this conversation, he

recognized Achberger's voice (Transcript, Volume VI, Pages 660-687).

Frederick Frasheur testified that in the latter part of July 1975, he stole a knife from Bobby DeLuca, the Respondent's common-law wife's brother. The knife disappeared between July 20 and July 25, 1975. The next time Frasheur saw the knife was shortly thereafter, in the possession of the Respondent. Frasheur identified State's Exhibit Number 38 as the knife in question (Transcript, Volume VI, Pages 703-729).

Charles Edward Barna, a criminalist with the Ohio Bureau of Criminal Identification and Investigation specializing in serology, testified that State's Exhibit No. 63, a brown leather jacket, had blood on it. Mr. Barna was, however, unable to say whether the blood was human or animal (Transcript, Volume VI, Pages 775-781). Deputy Sheriff Thomas Pizzute testified that State's Exhibit No. 64, a booking sheet, reflected an entry indicating that a brown leather jacket was in the Respondent's possession when he was booked (Transcript, Volume VI, Pages 788-793). Robert Heatwall and Larry Hudson testified as to the chain of custody of the jacket. The Petitioner then rested its case.

Achberger presented several witnesses in an attempt to impeach the testimony of Donald Webb. Achberger's main defense was, however, alibi. Thomas Makinson testified that he and his wife, Audrey, went to Achberger's home on August 22, 1975 at approximately 7:00 P.M. or 7:30 P.M. and stayed the entire evening. Makinson testified that Achberger never left his home. Audrey Makinson's testimony corroborated that given by her husband (Transcript, Volume IX, Pages 1019-1071).

The Respondent also presented an alibi defense. Joyce Yeager, Respondent's common-law wife, testified that the Respondent was with her in West Sacramento, California on the night of the murder (Transcript, Volume X, Pages 1244-1249). Further, Respondent presented several other witnesses in an attempt to impeach the Petitioner's witnesses.

On rebuttal, the Petitioner presented the testimony of Mrs. Ray Clark, a former neighbor of Respondent's common-law wife's father, Angelo DeLuca. Mrs. Clark testified that one or two days after August 21, 1975, Angelo DeLuca received a phone call from his daughter who was in California, on Mrs. Clark's phone. Immediately after the conclusion of the conversation, Mrs. Clark testified that DeLuca told her that Joyce's boyfriend had left her and returned to Akron. Joyce Yeager, Respondent's main alibi witness, had denied the existence of this conversation (Transcript, Volume XI, Pages 1534-1545).

Neither the Respondent nor Achberger testified on their own behalf. As was previously indicated, both men were convicted of Aggravated Murder with two Specifications and Aggravated Robbery.

PETITIONER'S REASON FOR GRANTING THE WRIT

The Respondent presented an alibi defense through the testimony of Joyce Yeager, who testified that she and the Respondent were in California at the time the crime was committed. Further, Ms. Yeager testified that during that time period, she never called Mrs. Ray Clark's home in

order to speak with her (Yeager's) father, Angelo DeLuca, and advise him that Respondent had left her in California and returned to Akron. Mr. DeLuca did not have a telephone in his home, but he did receive calls at the home of his neighbor, Mrs. Clark. The essence of Mrs. Clark's testimony was that some time after August 21, 1976, she received a phone call from Ms. Yeager for Mr. DeLuca. Mrs. Clark testified that after the conversation with his daughter, DeLuca appeared upset. Mrs. Clark then asked DeLuca how his daughter was and he replied, "Not too good—her boyfriend ran off and left her." DeLuca further explained that Ms. Yeager had advised him that Respondent had returned to Akron. The Petitioner maintains that this testimony of an unbiased, disinterested witness was offered in an attempt to impeach Joyce Yeager. Petitioner submits that this evidence was admissible for the limited purpose of impeachment, irrespective of the hearsay rule.

The Ohio Ninth District Court of Appeals based its reversal of this case upon the improper admission of Mrs. Clark's testimony in that the objectionable evidence did not fit within a well recognized exception to the hearsay rule. That Court felt that the Respondent's confrontation right had been infringed by the admission of this testimony. The Petitioner, however, respectfully submits that such an admission does not automatically result in a constitutional deprivation. As Mr. Justice White wrote in *California v. Green*, 399 U.S. 149 (1969):

> The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.
> *Green, supra*, at page 156

The Petitioner maintains a statement may be admissible even though it does not fit within a recognized exception to the hearsay rule. *Dallas v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).

Alternatively, the Petitioner respectfully submits that if any error was committed, it was harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). The Petitioner presented the testimony of Donald Webb, a co-defendant, who unequivocally implicated the Respondent in the homicide. Further, the testimony of Michael Burns and Frederick Frasheur corroborated that given by Webb. The Petitioner maintains that the test set forth in *Chapman, supra*, has been met in that there is no reasonable possibility that the alleged improper testimony contributed to the conviction because it was, at best, cumulative. Therefore, the Petitioner respectfully submits that no reversible constitutional error was committed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEPHAN M. GABALAC
Summit County Prosecuting Attorney

/s/ Carl M. Layman III

CARL M. LAYMAN III
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CERTIFICATION

I, CARL M. LAYMAN III, Being a member of the bar of the United States Supreme Court, do certify, pursuant to Supreme Court Rule 33(3)(b), that a copy of the Petitioner's Petition for a Writ of Certiorari was mailed by U.S. First Class mail to: DONALD S. VARIAN, JR., Attorney at Law, 277 South Broadway Street, Akron, Ohio 44308.

/s/ Carl M. Layman III
CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division

APPENDIX A
Judgment Entry of the Trial Court

THE STATE OF OHIO
Summit County ss:

COURT OF COMMON PLEAS

SEPTEMBER Term 1976

THE STATE OF OHIO
vs.
DANIE LEE TETER

No. CR 76 4 436
JOURNAL
ENTRY

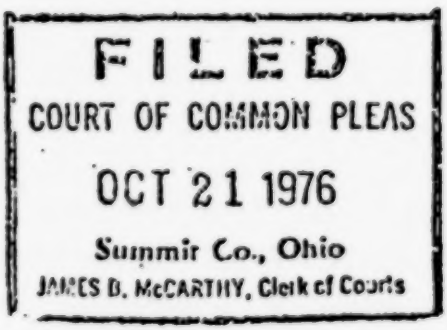
THIS DAY, to-wit: The 21st day of October A.D., 1976, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, DANIE LEE TETER, being in Court with counsel, DONALD S. VARIAN, JR. and JOHN CAMPBELL, for a hearing as to any mitigating circumstances in this matter. After hearing arguments of counsel and upon due consideration of all reports and other evidence presented, the Court finds that there was a mitigating circumstance present, to-wit: "The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

THEREUPON, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that the said Defendant, DANIE LEE TETER, be imprisoned and confined in the OHIO STATE PENITENTIARY at Columbus, Ohio, for THE REMAINDER OF HIS NATURAL LIFE for punishment of the crime of AGGRAVATED MURDER WITH SPECIFICATIONS, Ohio Revised Code Section 2903.01 (B), a Special Felony, and for an indeterminate period of not less than SEVEN (7) YEARS and not more than the maximum of TWENTY-FIVE (25) YEARS for punishment of the crime of AGGRAVATED ROBBERY, Ohio Revised Code Section 2911.01, a felony of the first (1st) degree, said sentences to be served CONSECUTIVELY and not concurrently with each other, and that he pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32 (A) (2) of the Criminal Rules of Procedure, Ohio Supreme Court.

APPROVED:
October 21, 1976
am



JOHN W. REECE, Judge
Court of Common Pleas
Summit County, Ohio

cc: Attorney Donald S. Varian, Jr.
Attorney John Campbell
Booking Desk
Adult Probation Department
Psycho-Diagnostic Clinic
Witness Assistance
Prosecuting Attorney

****

APPENDIX B
Unreported Opinion of the Ohio Ninth District Court of Appeals

****

STATE OF OHIO)		IN THE COURT OF
) ss:		APPEALS NINTH
SUMMIT COUNTY)		JUDICIAL DISTRICT
		(January Term, 1977)
STATE OF OHIO	)	C. A. No. 8301
	)	
Plaintiff-Appellee	)	
	)	
v.	)	APPEAL FROM JUDG-
	)	MENT ENTERED IN
DANIE LEE TETER	)	THE COURT OF COM-
	)	MON PLEAS OF SUM-
Defendant-Appellant	)	MIT COUNTY, OHIO
	)	CASE NO. 76 4 436

DECISION AND JOURNAL ENTRY

Dated: September 8, 1977

This cause was heard May 2, 1977, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, J.

On the evening of August 22, 1975, Gary Yost, regularly employed as a Detective Sergeant in the Akron Police Department, Narcotic Division, left his home for work as a part-time security guard position at Shippers Dispatch Co. This was the last occasion on which his family would see him alive. After Mrs. Yost had requested assistance in finding her husband, who had not returned home for work at the usual hour, Yost's body was discovered the next day.

The local and state law enforcement agencies immediately began an investigation of Yost's death. This investigation ultimately led to the questioning of Donald Webb and, through his statements, to a number of other defendants, including appellant Danie Lee Teter. On the basis of these communications and further investigation, the police and the office of the Summit County Prosecutor, constructed a case for presentation to the grand jury. In early 1976, that body returned indictments, charging aggravated murder with specifications, against defendant Teter, Wilford Hyde, Marion Sperrow, Terry Achberger and Donald Webb.

In May of the same year, the trial court heard testimony on defendants' joint motion to dismiss these charges due to irregularities in the grand jury proceedings. The trial court granted that motion and, after further grand jury consideration, new indictments for the same crime were returned against the same defendants. On arraignment, each of the defendants entered his plea of not guilty.

Thereafter, Hyde's case was ordered severed for a separate trial due to the allegation that he had made certain inculpatory statements involving himself and other defendants. Hyde was tried and found not guilty whereupon the

state moved for the dismissal without prejudice of the case against Sperrow. This motion, in the form indicated, was denied but Sperrow's case was also severed and he, too, was tried separately and found not guilty. After their motions for severance and separate trial were overruled, Achberger and Teter were tried jointly. Each was convicted and sentenced to life imprisonment on the aggravated murder count and 7 to 25 years on the second charge of aggravated robbery. Webb was permitted to plead guilty to murder and aggravated robbery and was sentenced accordingly.

Motions for new trial were heard and denied and the defendant, Teter, brings this appeal. We will refer further to certain other facts surrounding the trial or pre-trial proceedings as are necessary to discuss the nine individual assignments of error.

Assignment of Error I

"The trial court erred to the prejudice of defendant Danie Lee Teter in ordering joint trial of defendants Teter, Achberger, and Sperrow, and erred further in ordering severance of the case against defendant Sperrow on the day of trial."

We refer to Crim. R. 14 which reads:

"***

"When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown."

This rule is reiterative of the wording and spirit of the previous statute, R.C. 2945.20. Good reason exists for this and similar rules as the defendant suggests in his quotation from Spencer v. Texas, 385 U.S. 554 (1967):

> "*** all joint trials *** of several defendants *** present inherent opportunities for unfairness ***."

Among the courts of this state, there is tacit agreement with the thought above and, thus, precedent mandates that if the prosecution moves for joinder, it must not only show good cause, but also must meet the burden of proving same. State v. Abbot, 152 Ohio St. 228 (1949); State v. Perod, 15 Ohio App. 2d 115 (1968). In State v. Fields, 29 Ohio App. 2d 154 (1971), Judge Holmes states that while the statute is absent any true guidelines concerning the manner of proving good cause, it may be proven in any "reasonable manner consistent with proof of motions generally," including a prosecutor's professional statement. We agree with this postulate and his general definition of good cause as being "necessarily *** some operative factor not present in every case of joint indictments of defendants in capital cases," Fields, supra, at 158.

Within the general standards mentioned, the trial judge's discretion is the cardinal factor in deciding whether joint or separate trials are held. The critical question involved in this assignment is the trial judge's discretion or abuse of discretion. See, State v. Perod, supra. In People v. Sweetin, 325 Ill. 245, 156 N.E. 354 (1927) op cit. Abbott, supra, it is stated:

> "While it is generally a matter of discretion with the court as to whether a separate trial shall be granted, such discretion is not arbitrary but should be so exercised as to prevent injustice whenever possible.***."

What facts or offers of proof were made to the court relating to the state's motion for joinder? The transcript of proceedings (indicated below by volume and page references in parenthesis) indicate the following reasons advanced prior to trial.

1. All defendants were jointly indicted by the grand jury. (I, 84).
2. The evidence will indicate that defendants acted in concert in the homicide and associated robbery. (I, 84).
3. All of the defendants were at and left the scene together. (I, 85).
4. Defendants acted in a course of conduct to commit robbery and that course of conduct resulted in eventual murder. (I, 85).
5. Joint trial would enable the jury to better evaluate the evidence as to each defendant. (I, 85).
6. No inculpatory statements were made by any of the defendants. (I, 86).
7. Webb's statements involve all of the indicted defendants (I, 86) and he would testify against all of them. (I, 127).
8. Although no notice had been formally filed, each of the defendants were inclined to adopt defenses of alibi. (I, 88).
9. In all cases the 90 day rule was applicable, although waivable.

Applying the reasoning of the cases previously cited, it appears that, indeed, circumstances favoring joinder were before the court, which circumstances (operative facts) were not necessarily present in all joint indictments in capital cases. We believe and hold that in view of the prosecutor's representations the court did not abuse its

discretion in ordering a joint trial of Teter and Achberger.

This is particularly true in view of the eventual severance of both Hyde's and Sperrow's cases. We also restate Fields, supra, and Abbott, supra, which stress: that although separate trials must, in all cases, result in additional time and labor as well as expense, this should not be strongly considered as determinative in deciding the question of joinder. We recognize Sperrow's severance on the day of trial was unfortunate from the standpoint of time. But, in view of the long voir dire and the delay during the trial itself, we believe counsel had sufficient time for preparation of his case so as to provide appellant adequate representation.

We reject assignment of error I.

Assignment of Error III

"The trial court prejudiciously erred by admitting, over the objection of the defendant, testimony and evidence relating to the prior convictions of the defendant."

Defendant complains of the prosecution's questions, particularly those put to his wife, concerning defendant's past criminal history. It will be recalled that Teter did not testify in the instant cause. Thus, his prior convictions are, in theory, not called into issue before the jury. 15A O. Jur. 2d Criminal Practice and Procedure §234. Defendant cites a number of examples gleaned from Vol. X of the transcript of proceedings; instances of appellant's prior record being put before the jury. However, prior to this testimony being elicited, the subject was broached by appellant himself in his cross-examination of Michael Burns (Vol. V, 608 et seq.).

"Q. Did you know at this time that Danie [Teter] was on probation for a misdemeanor by this court?

"A. I knew he was on probation, but I didn't know what the charges were.

"Q. Did you know he was on probation and he didn't report for that?

"A. Yes, I was aware that he didn't report.

"***

"Q. Did you know there were times when he'd think the police were coming to pick him up and he may stay a night in a motel and then come back to his father-in-law's house?

"A. No, I didn't know what his motive was for staying in other places."

At a later point in the same examination, appellant interrogated Burns on why Teter indicated a desire to go to California and "start a new life," (Vol. V, 620 et seq.):

"Q. All right. He told you he was on probation and that was a problem to him?

"A. Uh-huh.

"Q. Is that right?

"A. Yes."

If not by inference before this, the jury was now introduced to a portion of appellant's background by virtue of his own questions. No error accrues here in favor of the appellant where statements concerning a past criminal involvement are elicited by his own cross-examination of the state's witness. State v. Lancaster, 25 Ohio St. 2d 83, 90 (1971).

As Burns subsequently testified, Teter sold him speed; others also testified as to his engagement in the drug trade

and those witnesses were cross-examined on the same subject matter.

The portions of testimony stand in stark contrast to Joyce Yeager's testimony that her husband (Teter) was a "wonderful guy" (Vol. X, 1271 et seq.). Her answer to appellant's counsel's invitation to tell the jury "*** what kind of a guy is he [the appellant]" (Vol. X, 1271) opens to the prosecution an avenue of questioning not formerly open to cross-examination questions.

Considering the totality of the evidence elicited prior to the questioning complained of, we find no error in the allowance of such testimony.

We find no merit in assignment III.

Assignment of Error IV

"The trial court committed reversible error as to its procedure and ruling concerning the certification of prosecution witnesses."

Crim. R. 16(B)(1)(e) to which we refer in this discussion reads in pertinent part:

> "Witness names and addresses; record.
> "Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. ***."

In the instant case, the prosecution attempted to have the aforementioned Michael Burns and others "certified" under the above rule.

In setting out the procedures preliminary to such a declaration, the trial court ordered an in camera hearing of the type approved by this court in State v. Owens, #7491 (9th Dist. Ct. App., June 4, 1975), except that any representations made in this matter were to be reduced to record as suggested in Owens. This procedure which took place without the presence of the appellant or his attorney was as described in Vol. I, 171 et seq.

The in camera hearing was conducted and, on the basis of the information received by the court, the trial judge certified Burns and others. We find no abuse of discretion by the court in so doing, considering, among other factors, the statements made to him by the prosecutor. While the latter's words here do not rise to the level of a professional statement, we have no reason to detract in any manner from the validity of his recital of the reasons for his request for certification as he knew those reasons to be. The record indicates no showing of a lack of good faith on his part. Here no reason is evidenced mandating the evidential hearing suggested by the appellant. Nor do we agree that defense counsel should be present.

While we are certain that the confidential nature of such a hearing, if held in this case, would have been held intact by the attorneys representing the appellant, we cannot always be assured that if the names of the certified witnesses were known to counsel, they would not be soon known to the client. To set such a precedent would inevitably defeat the cause for the rule in some isolated instance and always pose an ethical puzzle for counsel who, on one side, abides by the ruling of the court and, on the

other, strives to fully protect his client.

We reject assignment of error IV. We do not find the trial court's action in this regard was arbitrary and capricious.

Assignment of Error V.

"The trial court erred to the prejudice of defendant Danie Teter by excluding the testimony of Jerry Thiffault, Summit County Probation Department, regarding statements to him by defendant made in December, 1975."

Before we discuss this assignment, it might be well to clarify one question raised regarding this and other contentions of both parties. The proposed Ohio rules of evidence cited, and seemingly relied upon by both parties, are the proposed rules and nothing more, until and unless adopted by the legislature. They may serve as some guide to the rules of evidence prior to enactment. They do not govern the admission of evidence in this case. Nor can it be said that the counterpart to the proposed rules, the Federal rules, apply. They are not considered of great weight or authority, except as they may state the Ohio rules of evidence in existence at the time of hearing.

We agree with the ruling of the court forbidding Mr. Thiffault's testimony. Even outside the terms of certain Federal or proposed (State) rules of evidence, the testimony of the probation officer, without the testimony of the defendant, is clearly hearsay in character and, because declarant is the defendant, a party, such testimony is self-serving in nature. The state's testimony establishes without question that the death of Mr. Yost occurred on August 22, 1975. Teter's statement to Thiffault is alleged to have been made in December of that same year. While it must be admitted that defendant's statement, that he was absent

from the state in violation of his probation order, can well be considered as a statement against his penal interest, we cannot test the statement and find it as being against his interests in this cause. We cannot agree that the statement comes within some exception allowing its introduction—not for the purpose of proving the truth of the matter asserted—but only as proving the statement was indeed made. As such, it is inadmissible. State v. Lewis, 22 Ohio St. 2d 125 (1970).

We hold that the defendant's report to Thiffault is an extrajudicial statement offered (notwithstanding the suggestion of his counsel) for the purpose of giving evidence as to the truth of its declaration. No exceptions being applicable, the statement is excludable hearsay evidence and should not be admitted.

We reject assignment of error V.

Assignment of Error VII

"The ten day recess taken near the end of the state's case was an abuse of discretion by the trial court which prejudiced the defendant."

The transcript of proceedings (Voir dire Volumes, Vol. I, 15, 40; Vol. II, 420; and trial Vol. VI, 803, et seq.) indicate clearly the court's announced intention to recess the trial. The trial judge indicated in advance of final jury selection the dates of the recess; appellant was present but took no exception. Near the end of the state's case-in-chief, the court said (Vol. VI, 803):

"***, we'll conclude for the day and for the week.

"As I indicated to you when we first started the trial, we'll be in recess next week. It's a little unusual to be recessed that long. However, we still have a — quite a

ways to go on this trial, so I don't think we'll interfere to any great degree.

"***."

The jury was then admonished and released. Only at this point, did appellant object. We find that, having been given notice of the recess in advance and failing to object in a timely fashion thereof, appellant waived any error.

We overrule assignment of error VII.

Assignment of Error VI

"The trial court committed reversible error by admitting prejudicial evidence without the proper foundation of showing of relevancy."

During the course of trial, Donald Webb testified on cross-examination that on the evening of August 22, 1975, appellant wore a brown leather jacket (Vol. IV, 248). Asked if he could identify it further in detail, Webb replied in the negative. Later he affirmed that the only description of Teter's clothes he could give concerned a brown jacket, (Vol. IV, 290), a leather coat (Vol. IV, 345).

On July 9, 1976, several days into trial, a discussion took place between counsel and the court (Vol. VI, 646 et seq.) concerning the testimony of certain witnesses whose names had not been submitted to the defendant previously under Crim. R. 16 discovery order. The court was informed that additional witnesses were added because of the following circumstances: when Teter was arrested in April, 1976, some eight months after the death of Mr. Yost, he was wearing a brown leather jacket. According to the prosecutor (Vol. VI, 648):

"***

"*** A test was run on the coat that the defendant was wearing at the time [he] was arrested. That test was not completed until yesterday. Therefore, we didn't anticipate using that type of evidence. ***."

Apparently, it was ascertained that blood was on the jacket at the time of the test which, according to later statements and testimony, was run on July 8, 1976. At the direction of the court, who proceeded with great care in regard to this as well as other troublesome evidentiary questions, Mr. Charles Barna of B.C.I. testified first outside the presence of the jury (Vol. VI, 756 et seq.).

Barna received the coat from the sheriff's office on July 8. The coat checked "positive for the presence of blood" on the left rear shoulder and collar. The right sleeve and cuff showed "splattering—several spots;" other areas of stain were also noted. As indicated, identification was made confirming that the spots were blood; no determination was possible as to type or as to human or animal origin. Further, Barna testified the blood could have been on the jacket in August, 1975.

The trial court ruled m m m m m

"***

"Based on the testimony of Webb that there was a brown leather jacket being worn by the defendant Teter on the night in question, and based on the fact that that pattern of blood spots defined by Mr. Barna there could be an inference raised that that blood could have come from incidents involving the crime in question.

"I'll admit the testimony over objection of the defendant. There are inferences that can be drawn from it. There are possibly explanations that can be given. I'll admit the testimony."

Barna testified, subject to testimony establishing a chain of evidence from the appellant's locker in the county jail to Bureau of Criminal Investigation and back, which evidence was to be supplied by other witnesses. No witness testified that the coat was the same coat worn by appellant in August. Appellant's counsel cross-examined Barna regarding the examination made and the findings reported. This lengthy recital of the circumstances, surrounding the eventual introduction of the testimony concerning the coat, is necessary because the moment defendant chose to interrogate Barna concerning the testing, it might be argued that defendant waived his right to object to the exhibit and testimony. We do not believe this line of reasoning should be applicable here.

The reasoning of the trial court and the argument of the prosecutor are both persuasive. But we believe each fails to establish a sound basis for admitting the evidence in question when one considers the objections thereto which are:

1. No evidence appears in the record that the brown jacket worn by the defendant at the time of his arrest in April, 1976, was the *same* brown jacket as was alleged to have been worn by him at the time of Mr. Yost's death in August, 1975.

We suppose one could argue that because the jackets involved were both the same color, and possibly material, an inference could be drawn that the jackets were indeed one and the same.

2. No evidence appears on the record as to the condition of the jacket marked as State's Exhibit 44 *prior* to August of 1975, nor in fact is there any evidence as to what happened to the exhibit between April and July, 1976, other than a

statement to the effect that it had been taken from the appellant's locker at the county jail and brought to the prosecutor's office at the time the tests were to berun at B.C.I. The booking sheet, of course, receipts the jacket at the time of arrest. Whether the locker was locked or secured in any way is not known. The inference can be drawn, of course, that the blood could have been placed on the jacket on August 22, 1975, and not before and not after. Other contrary inferences are equally possible.

3. No evidence appears establishing the blood in question as being human only that that is possibly so. To be of any value as an exhibit, the inference must be drawn that the blood is more probably than not, human blood. This inference, of course, may be drawn.

Judge Mahoney of this court, speaking in State v. Moore, 47 Ohio App. 2d 181 (1973) said:

"*** The burden of establishing a chain of evidence to identify the specimens or exhibits is upon the state. ***. However, the burden is not an absolute one. Where there is no evidence indicating confusion with the identity of the specimen or of the possibility of tampering with it, then the testimony of the expert should be admitted. ***." (at page 183).

He continues to say:

"***. The practicalities of proof do not require the state to negate all possibilities of substitution or tampering. The state need only establish that it is reasonably certain that substitutions, alteration or tampering did not occur. ***." (at page 183).

See also, City of Columbus v. Marks, 118 Ohio App. 359 (1963); State v. Myers, 82 Ohio L. Abs. 216 (1959).

Here there is no such reasonable certainty.

We hold that the circumstances surrounding the receipt and keeping of the exhibit, establish a lack of probative evidence establishing the jacket introduced as being the jacket worn at the scene of the homicide. The necessity of adding consecutive inferences, one to the other, to give viability to that evidence precludes the admission of the jacket and evidence of the testing thereof. Further, we hold that because of the speculative inferences which are brought to the mind of any juror, the admission of such testimony was erroneous and prejudicial to the defendant (as a matter of interest we call attention to the prosecutor's agreement on page 1596 of Vol. XI).

Assignment of Error II

"The trial court erred to the prejudice of the defendant Danie Lee Teter by allowing the testimony of Mrs. Ray Clark, as such testimony was clearly inadmissible hearsay."

We have not discussed this assignment in sequence, feeling that some elements of discussion pertinent here, are equally so in regard to our discussion of assignment of error V. The trial court's attention to the evidentiary question raised here was commendable. We do not, however, agree with his conclusions.

The evidence elicited by the prosecution on its cross-examination of Joyce Yeager (Teter) establishes that while in California, she called her father, Mr. DeLuca. Since the father had no phone himself, a neighbor, Mrs. Ray Clark, on receiving the call would go to his home, get him and he would return with her to her home to converse with his daughter. Ms. Yeager was asked the following questions to which she replied in the negative:

"***

"Q. Did you ever at any time telephone through Mrs. Clark and talk to your father and tell him that you were upset because Danie had left you stranded in California?" (Vol. X, 1311).

She also testified that, at all times pertinent to the homicide, Teter was with her in California. On rebuttal, the state produced Mrs. Clark for the purpose of obtaining her testimony concerning a particular phone call. We will discuss the contents thereof further in detail. Preceding her testimony to members of the jury, however, she was questioned outside their presence. Arguments concerning the admissibility of her testimony were presented by the parties after which the court allowed Mrs. Clark to testify. The rationale of the court's ruling is reported in Vol. XI, beginning at page 1494.

The testimony desired by the prosecution pertained to a conversation between Mrs. Clark and Mr. DeLuca. The latter spoke to his daughter on the telephone and outside the presence of Mrs. Clark. On his return to the room where Mrs. Clark waited, he "seemed sort of upset") (Vol. XI, 1540). When she inquired of him as to his daughter, he replied, "Not too good—her boyfriend ran off and left her." In answer to Mrs. Clark's inquiry regarding the "boyfriend's whereabouts, DeLuca said, "He's back in Akron," (ibid, 1541). The evidence given by her would tend to indicate that the call in question was made prior to the birth of defendant's child and after August 21, 1976. Mrs. Clark had no doubt whatsoever about the identity of Ms. Yeager as the caller.

The testimony indicated was given over the strong objection of defendant and the co-defendant Achberger. The court instructed the jury that he was allowing Mrs.

Clark's testimony as an exception to the hearsay evidence rule and advised them to view such testimony with care and caution. It should be noted further, that Mr. DeLuca was not available to testify though strenuous efforts apparently were made to find him and secure his testimony.

The record before us indicates a long and thoughtful statement of the trial court on his reasons for accepting the evidence. It would not be unfair to suggest that the court's decision was based in part on certain Federal cases, the application of Federal Rules of Evidence 803 and Proposed Ohio State Criminal Rule 803. The court found that certain exceptions to the hearsay rule were incorporated therein; he rejected such testimony on the basis of an excited utterance or present sense impression and we agree. The third exception recognized by the court involved rule 803 subsection 24 which reads in part (See, Vol. XI, 1515, et seq.):

> "that a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:
>
> "(a) the statement is offered as evidence for a material fact.
>
> "(b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.
>
> "(c) the general purposes of these rules and the interests of justice will best be served by admission [of it] into evidence.
>
> (d) suggests the statement may not be admitted if the above criteria are met unless one's opponent is given sufficient notice of the intended use of the testimony so as to be prepared to meet it.

We agree that the statement may properly qualify on the first two sections of the rule set forth. We are not in agreement that section (c) is satisfied also. In addition, we repeat what we have previously said herein—the Federal Rules of Evidence, except as being helpful guideposts, are not applicable to this cause.

Ohio has long followed the strictures of the standard hearsay rule and its varied (and not always clear) exceptions. As was the case in a previous assignment, we recognize that here, the statement of the claimant is one made outside the courtroom and obviously offered for the purpose of the truth asserted therein. It is, therefore, hearsay. We find no exception in the hearsay rule allowing its admission.

We feel that the cases cited, U.S. v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968); Wirth v. State, 197 N.W. 2d 731, 55 Wis. 2d 11 (1972); and Bertang v. State, 184 N.W. 2d 867, 50 Wis. 2d 702 (1971) are distinguishable from the instant cause.

All evidence, admitted under the guise of being an exception to the hearsay rule, is evidence admitted because of necessity and because of direct or circumstantial guaranty of its truthworthiness. Judge Learned Hand in C & G Merriman Co. v. Syndicate Pub. Co., 207 F. 515 (1913), unable to find certain testimony capable of admission because it could not be categorized as a hearsay exception says of that evidence:

> "*** I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatsoever because it fulfills both the requisites of an exception to the hearsay rule, *necessity and circumstantial guarantee of trustworthiness.*" (Emphasis added).

Applying those tests here, the necessity of the hearsay arises only as a rebuttal instrument, remembering that the original declarant Joyce Yeager, is available and has testified to the conversation (or lack of it).

As to the second standard, the guaranty of trustworthiness, we have no question as to Mrs. Clark's truthfulness in relating the conversation as she best remembers it. But is such a guaranty existent in her repeating what Mr. DeLuca said that his daughter told him? When he says that "her boyfriend is in Akron" is DeLuca quoting his daughter, as we infer from the testimony before us, or does he speak from some personal observation?

If the former, how do we test her quoted assertion that Teter (if he is indeed the boyfriend alluded to) returned to Akron? While we search for the truth, we do so in an adversary system. Absent examination to provide justification to make such an attribution, we do not find the guaranteed quality of trustworthiness sufficiently strong under these circumstances to affirm the correctness of allowing such testimony to be introduced into evidence. Since the Federal Rule cited served to sustain the trial court's acceptance of the evidence in question, we discuss the matter as we do and further cite Dallas Co. v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) for its excellent discussion of the subject.

The phrase "interest of justice," as used in Fed. R. 803 §24(c) is so vital, yet so vague in application. We assume it to mean, here, interest of justice to both the state *and* the defendant. While it is imperative to place before the jury all evidence available to test the truth of the accusations made and defenses offered, we must be sure that only proper evidence is so admitted.

We find the allowance of the evidence, subject of this assignment, constitutes error prejudicial to the defendant.

Assignment of Error VIII

"The trial court committed prejudicial error by admitting into evidence the agreement between Donald Webb and the State of Ohio."

We also agree in part with this contention of error. Again, some outline of the facts involved are necessary. Donald Webb is the only defendant to admit his part in the events leading to and encompassing the death of Yost. Prior to the taking of evidence, each of the parties, both state and defense, made it clear to the jury that Webb had made "a deal with the prosecution." As heretofore indicated, in return for his testimony, Webb was allowed to enter a plea of guilty to a lesser crime. Certain other terms surrounding this arrangement were brought out in the testimony. We have no argument with this type of testimony. During the course of his testimony, he was asked to identify state's exhibit one and did so, indicating it to be the written agreement he entered into with the state. He was then asked (Vol. III, 121, et seq.):

"***

"Q. Does it indicate on there who signed that agreement?

"A. Yes.

"Q. Did you sign that agreement?

"A. Yes.

"Q. Who else signed that agreement?

"A. My lawyers, the detectives and the Judge and the prosecutors.

"***."

Further evidence as to the promises made by the prosecutor to Webb was given throughout the subsequent examination and cross-examination. No further mention was made of any involvement by the court in these negotiations. The prosecution, however, then offered exhibit 1 into evidence (Vol. VII, 827 et seq.). Both defendants, including Teter, objected but the letter was accepted.

The letter itself, dated June 2, 1976, forms a portion of this file and is not repeated verbatim here because of its length. This letter is written on the stationery of the prosecuting attorney. It alludes to Webb's confession of involvement and states that two police agencies have investigated the matter and determined, as fact, that Webb did not shoot Yost. It further speaks of the possible physical danger to Webb because of his testimony against the other defendants. Paragraph 7 thereof reads:

> "7.) The aforementioned disposition of Mr. Webb's case has been fully communicated to Judge John W. Reece and Judge Reece has indicated that he will accept said recommendations."

The agreement was signed by the prosecuting attorney, the attorneys for Webb, Webb himself, and agents of both the Akron police department and the Summit County Sheriff's office.

It is, of course, the duty of the finders of fact, (here the jury) to determine the issue of the credibility of witnesses who testify. 15 A. O. Jur. 2d Criminal Practice and Procedure §443; State v. May, 40 Ohio App. 2d 342, 345 (1975); Atkins v. State, 115 Ohio St. 542, 545 (1927). The members of that jury are instructed, as they were in the instant case, what they may consider in determining the matter of credibility. But here the introduction of the exhibit (as

opposed to verbal testimony) tends to establish the view that two police agencies have investigated the case and confirm (1) Webb's reliability as a witness; (b) that Webb did not fire the fatal shots; and (c) by inference that those who testify contrary to his testimony are not reliable or truthful. The letter then goes to the extent of involving the court's stamp of approval on the arrangement, a statement which might be easily understood by any juror as surely implying the court's own assessment of Webb's testimony as being the same as the police (and prosecution) view thereof.

Of course, the police view may well be entirely correct and the letter even casually read does not make any inference that the trial judge assesses the testimony of Webb in any manner whatsoever. The difficulty we experience here is overlooking the not too subtle fact that the letter *seems* to say more than it does in actuality, though the approval of the police agencies of Webb's testimony is more than subtly said. No cross-examination of that view is permissible when only the letter is admitted after the close of all the evidence. The reasons existing for ascribing validity to Webb's story as a result of the investigations conducted are not known except for the evidence placed before the jury during trial.

We find that the submission of the letter mentioned tends to invade the jury's province of being the sole determiners of the credibility of the witness Webb.

In spite of what has been said above, we are not convinced that prejudice has been demonstrated. Both parties were aware of the contents of the letter. The defense was allowed full inquiry requisite to a development, both of the character of the witness as well as his giving information to law enforcement agencies, indeed, to speak of certain areas of investigation made by those agencies. Repetitive and

reaching questions were asked concerning his agreement to the terms thereof. Thus, while the content of the letter tends to invade the province of the jury, it, taken with all of the other testimony, cannot be said to be clearly prejudicial in that respect.

While we believe it is error to have admitted the exhibit in question, we do not agree that this admission constituted error prejudicial to the rights of the defendant.

We reject assignment of error VIII.

Assignment of Error IX

"The trial court committed prejudicial error by not granting defendant's motion for new trial."

In light of our foregoing discussion, it is unnecessary to discuss this assignment.

Since we have sustained assignments of error II and VI, we reverse the judgment and remand the matter for a new trial.

- - -

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.
Exceptions.

/s/ Edward J. Mahoney
Presiding Judge
- for the Court -

VICTOR, J. CONCURS.
MAHONEY, P.J. CONCURS
IN THE JUDGMENT ONLY.

APPEARANCES:

STEPHAN M. GABALAC, Summit County Prosecutor (Carl M. Layman III, Asst. Prosecutor), City-County Safety Building, Akron, Ohio 44308 for Plaintiff-Appellee.

DONALD S. VARIAN, Attorney at Law, 277 South Broadway, Akron, Ohio 44308 for Defendant-Appellant.

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APPENDIX C
Order from the Ohio Supreme Court

****

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.
State of Ohio,
Appellant,

vs.

Danie Lee Teter,
Appellee.

1977 TERM
To wit: November 25, 1977

No. 77-1185
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for SUMMIT County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Stephen M. Gabalac

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____day of _____19_____

_____Clerk

_____Deputy